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In The Supreme Court of the United States

BRODERICK GRAVES; STEVEN JONES and GREGORY SMITH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition for Writ of Certiorari

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50 pp

QUESTION PRESENTED

I. Whether the Federal Sentencing Commission Reports of 1995 and 1997, finding that crack cocaine offenses had a disparate impact on African-Americans, invalidates the sentences of crack offenders, allowing them to proceed in a civil action for injunctive relief in violation of their civil rights for being sentenced under racially disparate guidelines.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Eleventh Circuit:

1. **BRODERICK GRAVES, STEVEN JONES and GREGORY SMITH**, *Defendants/ Appellants/Petitioners;*

2. **UNITED STATES OF AMERICA**, *Plaintiff/Appellee/Respondent.*

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As to the denial of the appeal from the Eleventh Circuit Court of Appeals, there are no other reports or opinions. The above-referenced documents and opinions can be found in the Appendix, beginning at App. 1.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Given the Judgment of the United States Court of Appeals for the Eleventh Circuit, the jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. §1254(1).

The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The Fifth Amendment, in pertinent part, sets forth: *"No person shall be...deprived of life, liberty, or property without due process of law."*

The Eighth Amendment sets forth: *"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."*

Title 21 U.S.C. 841(b)(1)(A), in pertinent part, says:

> *"In the case of a violation of subsection (a) of this section involving -*
>
> *(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of -*
>
> *(II) cocaine, its salts, optical and geometric isomers, and salts of isomers*
>
> *(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base.*
>
> *such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life..."*

As to the 100:1 ratio set out in 841, the Sentencing Commission's two reports regarding cocaine base have invalidated the purposes originally established for said ratio.

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STATEMENT OF THE CASE

Petitioners Graves, Jones, and Smith are all African-American males, who have all been convicted and sentenced for federal drug violations involving cocaine base ("crack"). All three received "life" sentences.

The above convictions and sentences stemmed from the 1986 enactment of the Anti-Drug Abuse Act, which established a 100-to-1 punishment ratio between powder cocaine and crack cocaine.[1] In addition, through the Anti-Drug Abuse Act of 1988, Congress established a mandatory minimum penalty for simple possession of "crack", which distinguished it from simple possession of all other controlled substances.[2]

The purported reasoning behind the 100:1 ratio was that Congress, without the benefit of any empirical data, and relying only on personal perceptions driving by extreme media coverage, arbitrarily found "crack" to be (i) extraordinarily addictive, characterizing it in such terms as "intensely addictive"; (ii) the cause behind crime going up at a tremendously increased rate," emphasizing what they believed was a higher correlation between crack cocaine use and the commission of other serious crime; (iii) more physiologically harmful than powder cocaine, leading to higher rates of psychosis and death; (iv) more

---

1 Pub. L. No. 99-570, 100 Stat. 3207 (1986).

2 Pub. L. No. 100-690, 102 Stat. 4181 (1988); 21 U.S.C. 844.

readily accessible to young people; and (v) used on a widespread basis due to its potency, relatively low cost, ease of manufacture, transportation, disposal, and consumption. Congress demonstrated its continued concern about the perceived dangers of "crack" in 1988, when it established a different penalty structure for "crack" offenses charged under the simple possession statute than for other drug offenses so charged. As such, Congress amended 21 U.S.C. § 844 to make "crack" the only drug with a mandatory minimum penalty for a first offense of simple possession.

In 1995, the United States Sentencing Commission (the "Commission"), due to increasing challenges to the appropriateness of the penalty provisions for "crack", reviewed the legislative history behind the Congressional decisions for the 1986 and 1988 Acts. The Commission found that: (i) the Congressional decisions to treat "crack" more harshly than powder were **deliberate**, not inadvertent; (ii) the Congressional decisions arose, primarily, from members' beliefs - not facts - that "crack" was significantly more dangerous than powder cocaine; (iii) the use of cocaine, regardless of form, is not physiologically addictive, although using any form of the drug could create psychological addiction; (iv) the use of cocaine creates essentially the same physiological response no matter what form the drug takes; (v) there did exist racial implications to the 100:1 ratio, as 88.3 percent of offenders convicted in federal court for crack cocaine distribution in 1993 were Black, while 7.1 percent were Hispanic; and (vi)

because there existed little support for the 100:1 disparity, the differential treatment between "crack" and powder cocaine should be eliminated.

On October 18, 1995, in spite of the data provided by the commission (both through statistical and chemical analysis), Congress voted to reject the Commission's recommendations, marking the first time that Congress had ever rejected a proposal from the Commission. However, Congress did request that the Commission take another look at the issue and submit yet another report, but this time with non-binding recommendations.

Pursuant to Public Law No. 104-38, the Commission submitted this second report to Congress in April, 1997. While the empirical data, regarding the lack of differences between "crack" and powder cocaine, did not significantly change, the 1997 Report recommended that the 100:1 ratio between "crack" and powder be reduced to a ratio of 5:1. Such a reduction of the ratio, rather than its overall elimination, appeared to be in response to the alleged systemic violence associated with "crack" transactions, in spite of the Guidelines already taking such a factor into account. Once again, Congress chose to ignore the data, and the recommendations of the Commission, and refused to change the 100:1 penalty provisions.

Furthermore, neither the support for such a reduction from Attorney General Janet Reno and "Drug Czar" Barry R. McCaffrey, nor letters from

some twenty-seven Federal Court Judges could move congress of its misinformed stance on the issue.

It is congress' willful disregard for the truth, and its clear intent to maintain and perpetuate a discriminatory practice which formed the basis for Petitioners' complaint in the present case. As presented in the Complaint, Congress has infringed upon the fundamental rights of due process and equal protection through its acquiescence to unsupported propaganda and personal beliefs in making a law which, based on overwhelming real evidence, has no rational basis to exist any longer.

As stated above, the district court dismissed Petitioners' complaint on September 27, 1999. In its Order, the district court found that Petitioners failed to state a claim on which relief could be granted. The basis for said decision rested solely on the precedent of the Eleventh Circuit, which has held the sentencing provisions for "crack" to be constitutional [Id.].

On October 5, 1999, Petitioners filed a timely Notice of Appeal, challenging the dismissal by the district court.

The appeal was filed with the Eleventh Circuit Court of Appeals on December 6, 1999 (App 3)and was denied on July 24, 2000. (App 1) This Petition for Writ of Certiorari follows. All Petitioners remain incarcerated under their respective "life" sentences.

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ISSUES AND ARGUMENTS

I. WHETHER THE FEDERAL SENTENCING COMMISSION REPORTS OF 1995 AND 1997, FINDING THAT CRACK COCAINE OFFENSES HAD A DISPARATE IMPACT ON AFRICAN-AMERICANS, INVALIDATES THE SENTENCES OF CRACK OFFENDERS, ALLOWING THEM TO PROCEED IN A CIVIL ACTION FOR INJUNCTIVE RELIEF IN VIOLATION OF THEIR CIVIL RIGHTS FOR BEING SENTENCED UNDER RACIALLY DISPARATE GUIDELINES.

The United States Court of Appeals denied relief for petitioner's Broderick Graves, individually, and as class representatives, et. al., on July 24, 2000, (App 1) stating that the civil rights action against the United States, seeking a declaratory judgment that the statute of the United States and the guidelines promulgated by the United States Sentencing Commission, which reflected disparate sentences between offenses involving cocaine base (crack) and powder cocaine, are constitutionally void on their face, was denied in that such determinations could not be evidenced as the plaintiff's action is barred by *Heck v. Humphrey*, 114 S.Ct. 2364 (1994).

This case was decided before the Federal Sentencing Commission in 1995 and 1997 declared that the Federal Sentencing Guidelines created a disparate impact on African-Americans in violation of their civil

rights by imposing sentences in a ratio of 100:1 against other white powder cocaine offenders. The Commission's studies also determined that there was no rational basis for the disparate treatment, and that it should be changed.

The first study was initiated in 1995 and resulted in findings of disparate impact on African-Americans and recommended to Congress that there be a complete change to equal that of powder cocaine in terms of sentencing dispositions. Congress had requested the 1995 study. Congress did not like what they heard and they asked the Commission to re-study the issue they had first requested them to study in 1995 again in 1997. However, the same result occurred in that the Commission found that there was a sentencing disparate impact on African-Americans and crack cocaine offenses that was divided along racial lines. As such, persons involved in crack cocaine offenses had their civil rights violated in addition to their constitutional rights.

It is acknowledged that all of the case law, prior to 1995 and 1997, and some after 1995 but before 1997, established that there was no criminal constitutional violation of the law related to the disparate treatment. That is not what is before this court. This is a civil rights issue and a determination of whether or not the Sentencing Commission's studies invalidate the sentences of the plaintiff's action for injunctive relief and release from sentences that result in a violation of a person's civil rights. The specific findings of this court must be that these Commission

studies renders such sentencing disparities invalid and, thus, allows the plaintiffs to proceed accordingly.

In this court's opinion, in *Heck v. Humphrey*, 114 S.Ct. 2354 (1994), it was found that a claim for damages for allegedly unconstitutional conviction or imprisonment, or for other actions whose unlawfulness would render a conviction or sentence invalid, is not cognizable under 42 U.S.C. 1983 unless the plaintiff proves that the conviction or sentence has been reversed, on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determinations, or called into question by a federal court's issuance of a Writ of Federal Habeas Corpus because (1) the common law of torts is the appropriate starting point for determining whether such claims are cognizable under 1983; (2) the common law cause of action for malicious prosecution provides the closest analogy to 1983 claims; (3) one element that must be alleged and proved that a malicious prosecution action is a determination of prior criminal proceeding in favor of the accused; and (4) the Supreme Court has long expressed similar concerns for finality and consistency has generally declined to expand opportunities for collateral attack.

The court further noted that when a state prisoner seeks damages in a suit under 42 U.S.C. 1983, a United States District Court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of conviction or sentence cycle, and if it would, the complaint must be dismissed unless the plaintiff can demonstrate the

conviction or sentence has already been invalidated, but if the District Court determines the action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, to actually be allowed to proceed, in the absence of some other bar of the suit. Such an action under 1983 is properly dismissed when it is found that a prisoner's damage claims challenge the legality of a conviction which has not been invalidated [emphasis added].

Heck dealt with a 1983 action for damages. The case before the court is not for damages, but injunctive relief, and relief from the length of the sentence, not the conviction. As such, the only thing that can be invalidated is the sentence. The Sentencing Commission's two studies results in an invalidation of the sentence imposed, and therefore, subjects the government to a suit in equity for relief in violation of the civil rights of the plaintiffs.

The civil rights are what is at issue, and if the Sentencing Commission determined that the civil rights of African-Americans were violated by the 100:1 ratio in the 1995 and 1997 Commission study, then such invalidates the length of the sentence imposed on those individuals who suffered from sentencing under crack cocaine sentencing guidelines. The Commission invalidated the standing of such disparate sentencing dispositions and that invalidation creates a cause of action to proceed pursuant to the claims of the plaintiffs in their original complaint.

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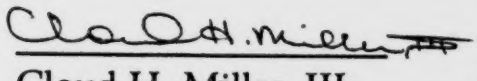
CONCLUSION

This Honorable Court should decide whether the two studies of the Sentencing Commission act as an invalidation of the sentences imposed on plaintiffs to such a degree as to allow them to proceed in a civil action against the government for injunctive relief and reduction of sentence relief.

The Court must also determine whether *Heck v. Humphrey*, a case involving a state prisoner in a 1983 action, even applies to the question of law presented. It is believed that the facts are distinctly different and that the invalidation of the sentence is sufficient to create a civil rights issue that may proceed in civil litigation via the original complaint as filed.



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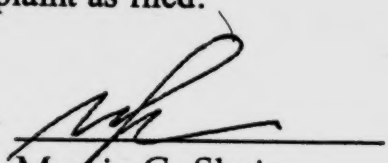
Attorney for Petitioners



Marcia G. Shein
Of Counsel

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[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13971

D C Docket No.99-00213-CV-JTC-1

BRODERICK GRAVES,
individually and as
Class Representative, et. al.,
Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(ENTERED: July 24, 2000)

Before ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

PER CURIAM:

Plaintiffs bring this civil rights action against the United States of America seeking a declaratory judgment that the statutes of the United States and the guidelines promulgated by the United States Sentencing Commission, which reflect a disparate sentence between offenses

involving cocaine base ("crack") and powder cocaine are constitutionally void on their face. Because plaintiffs were convicted and are serving life sentences pursuant to the challenged statutes and guidelines, and because plaintiffs cannot show that their convictions or sentences have been invalidated, plaintiffs' action is barred by Heck v. Humphrey, 114 S.Ct. 2364 (1994). In a case such as this, a "court must consider whether a judgment in favor of the plaintiff would necessarily imply the validity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Id. at 2372. This is true even though plaintiffs may have fully exhausted available state remedies. Id. at 2373. Under Heck, the kind of cause of action brought by plaintiffs here simply is not cognizable until and unless the plaintiffs demonstrate that their convictions or sentences have been invalidated. See also Abella v. Rubino, 63 F.3d 1063 (11th Cir. 1995).

Accordingly, the judgment of the district court dismissing plaintiffs' complaint is AFFIRMED.[1]

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[1] Because the claim is barred by Heck v. Humphrey, we of course cannot reach the merits. See United States v. Hanna, 153 F.3d 1286, 1289 (11th Cir. 1998); United States v. Byse, 28 F.3d 1165, 1170-71 (11th Cir. 1994); United States v. Solomon, 848 F.2d 156, 157-58 (11th Cir. 1988).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 99-13971-G

BRODERICK GRAVES, STEVEN JONES
and GREGORY SMITH
Plaintiffs/Appellants,
v.
UNITED STATES of AMERICA,
Defendant/Appellee.

APPEAL OF AN ORDER FROM THE
UNITED STATES DISTRICT COURT for the
NORTHERN DISTRICT of GEORGIA
DISMISSING A CIVIL ACTION
D. CT. CIVIL NUMBER - 1:99-CV-213-JTC

BRIEF OF APPELLANTS

ENTERED: DECEMBER 6, 1999
BRODERICK GRAVES, STEVEN JONES,
and GREGORY SMITH

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BRODERICK GRAVES, et al v. UNITED STATES

CASE NO. 99-13971-G

CERTIFICATE OF INTERESTED PERSONS AND

CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, and Federal Rules of Appellate Procedure (FRAP) 26.1, undersigned counsel hereby certifies that the following listed persons and parties have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal pursuant to the local rules of court:

1. **CAMP**, Honorable Jack T.

   United States District Court Judge

2. **BERANEK**, Lori M.

   Assistant United States Attorney/Counsel for Government

3. **GRAVES**, Broderick

   Plaintiff/Appellant

4. **JONES**, Steven

   Plaintiff/Appellant

5. **SMITH**, Gregory

   Plaintiff/Appellant

6. **SHEIN**, Marcia G.

   Counsel for Plaintiffs/Appellants

7. **BIGGS**, Richard D.

   Counsel for Plaintiffs/Appellants

With respect to this Appeal, there are no corporate entities for purposes of disclosure.

There are no identifiable victims.

STATEMENT REGARDING ORAL ARGUMENT

Appellants submit that the arguments contained herein are complete, but that oral argument would assist in the decision-making process. Therefore, Appellant requests oral argument unless the Court determines that argument is unnecessary.

STATEMENT REGARDING TYPE SIZE AND STYLE

Appellants submit that the type size and style used in preparing this brief is Arrus 14 point.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Pursuant to Federal Rules of Appellate Procedure 28(i), Appellants respectfully assert that there are no other arguments, from any other briefs, that are to be adopted by Appellants for the purposes of this appeal.

STATEMENT OF JURISDICTION

Presented, herein, is the appeal from a final Order of the U.S. District Court for the Northern District of Georgia, in a civil case, pursuant to a motion under Federal Rules of Appellate Procedure (FRAP) Rule 4(a). Jurisdiction is in the U.S. Court of Appeals for the Eleventh Circuit which is invoked pursuant to 28 U.S.C. §1291, providing that the Court of Appeals has jurisdiction from all final decisions of the U.S. District Court. This appeal has been timely filed.

STATEMENT OF THE ISSUES

I. Whether the District Court Erred in Dismissing Appellants' Civil Action Against the United States.

STATEMENT OF THE CASE

(i) Course of Proceedings and Dispositions - On January 26, 1999, Appellants filed a Civil Action in the Northern District Court of Georgia, setting forth that the United States Government has, on several fronts, worked to violate certain Constitutional rights of the Appellants, as well as a class of similarly situated individuals [R1-1- 43 thru 45].

On March 22, 1999, through a Motion and supporting Memorandum of Law, the government requested that the district court dismiss Appellants' complaint [R1-3].

On September 27, 1999, after receiving three additional pleadings regarding the possible dismissal, the district court dismissed Appellants' lawsuit [R1-7].

Appellants then filed a timely Notice of Appeal as to said dismissal [R1-9].

(ii) Statement of the Facts - Appellants Graves, Jones, and Smith are all African-American males, who have all been convicted and sentenced for federal drug violations involving cocaine base ("crack"). All three received "life" sentences.

The above convictions and sentences stemmed from the 1986 enactment of the Anti-Drug Abuse Act, which established a 100-to-1 punishment ratio between powder

cocaine and crack cocaine.[2] In addition, through the Anti-Drug Abuse Act of 1988, Congress established a mandatory minimum penalty for simple possession of "crack", which distinguished it from simple possession of all other controlled substances.[3]

The purported reasoning behind the 100:1 ratio was that Congress, without the benefit of any empirical data, and relying only on personal perceptions driving by extreme media coverage, arbitrarily found "crack" to be (i) extraordinarily addictive, characterizing it in such terms as "intensely addictive"; (ii) the cause behind crime going up at a tremendously increased rate," emphasizing what they believed was a higher correlation between crack cocaine use and the commission of other serious crime; (iii) more physiologically harmful than powder cocaine, leading to higher rates of psychosis and death; (iv) more readily accessible to young people; and (v) used on a widespread basis due to its potency, relatively low cost, ease of manufacture, transportation, disposal, and consumption. Congress demonstrated its continued concern about the perceived dangers of "crack" in 1988, when it established a different penalty structure for "crack" offenses charged under the simple possession statute than for other drug offenses so charged. As such, Congress amended 21 U.S.C. § 844 to make "crack" the only drug with a mandatory minimum penalty for a first offense of simple possession.

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2 Pub. L. No. 99-570, 100 Stat. 3207 (1986).

3 Pub. L. No. 100-690, 102 Stat. 4181 (1988); 21 U.S.C. 844.

In 1995, the United States Sentencing Commission (the "Commission"), due to increasing challenges to the appropriateness of the penalty provisions for "crack", reviewed the legislative history behind the Congressional decisions for the 1986 and 1988 Acts. The Commission found that: (i) the Congressional decisions to treat "crack" more harshly than powder were **deliberate**, not inadvertent; (ii) the Congressional decisions arose, primarily, from members' beliefs - not facts - that "crack" was significantly more dangerous than powder cocaine; (iii) the use of cocaine, regardless of form, is not physiologically addictive, although using any form of the drug could create psychological addiction; (iv) the use of cocaine creates essentially the same physiological response no matter what form the drug takes; (v) there did exist racial implications to the 100:1 ratio, as 88.3 percent of offenders convicted in federal court for crack cocaine distribution in 1993 were Black, while 7.1 percent were Hispanic; and (vi) because there existed little support for the 100:1 disparity, the differential treatment between "crack" and powder cocaine should be eliminated.

On October 18, 1995, in spite of the data provided by the commission (both through statistical and chemical analysis), Congress voted to reject the Commission's recommendations, marking the first time that Congress had ever rejected a proposal from the Commission. However, Congress did request that the Commission take another look at the issue and submit yet another report, but this time with non-binding recommendations.

Pursuant to Public Law No. 104-38, the Commission submitted this second report to Congress in April, 1997. While the empirical data, regarding the lack of differences between "crack" and powder cocaine, did not significantly change, the 1997 Report recommended that the 100:1 ratio between "crack" and powder be reduced to a ratio of 5:1. Such a reduction of the ratio, rather than its overall elimination, appeared to be in response to the alleged systemic violence associated with "crack" transactions, in spite of the Guidelines already taking such a factor into account. Once again, Congress chose to ignore the data, and the recommendations of the Commission, and refused to change the 100:1 penalty provisions.

Furthermore, neither the support for such a reduction from Attorney General Janet Reno and "Drug Czar" Barry R. McCaffrey, nor letters from some twenty-seven Federal Court Judges could move congress of its misinformed stance on the issue.

It is congress' willful disregard for the truth, and its clear intent to maintain and perpetuate a discriminatory practice which formed the basis for Appellants' complaint in the present case. As presented in the Complaint, Congress has infringed upon the fundamental rights of due process and equal protection through its acquiescence to unsupported propaganda and personal beliefs in making a law which, based on overwhelming real evidence, has no rational basis to exist any longer.

As stated above, the district court dismissed Appellants' complaint on September 27, 1999. In its Order, the district court found that Appellants failed to state a claim on which relief could be granted [R1-7-4]. The basis for said decision rested solely on the precedent of the Eleventh

Circuit, which has held the sentencing provisions for "crack" to be constitutional [Id.].

On October 5, 1999, Appellants filed a timely Notice of Appeal, challenging the dismissal by the district court. All Appellants remain incarcerated under their respective "life" sentences.

(iii) Statement of the Standard or Scope of Review

Issue I: When reviewing the dismissal of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court's must accept the allegations of the plaintiff as being true. With that in mind, the dismissal will be upheld only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. See ***Powell v. United States***, 945, F.2d 374, 375 (11th Cir. 1991)(citations omitted).

SUMMARY OF THE ARGUMENT

I. Appellants challenge the district court's dismissal of their civil action against the United States government. The basis for this challenge is that the district court sole purpose for finding that Appellants had failed to state a claim upon which relief could be afforded rested on the criminal case law of this Circuit having held that the sentencing provisions surrounding "crack" were constitutional.

As the relied upon precedent does not take into account the Reports and findings of the Sentencing commission in 1995 and/or 1997, the previous holdings can be distinguished from the newer challenges through new data presenting separate and distinct arguments in regard to the Constitutionality of Congress' actions.

Furthermore, the Civil Complaint contained issues regarding constitutional deprivations resulting from Congress' failure to act, and not the singular issue addressed by the district court's denial, to wit: the constitutionality of the enactment of the challenged statute. As such, Appellants have set forth a clear set of facts which could afford them relief.

Therefore, since it does not appear, beyond doubt, that Appellants could not prove any set of facts that would warrant relief, the dismissal of the civil action should be reversed.

ARGUMENTS AND CITATIONS OF AUTHORITY

ISSUE I

WHETHER THE DISTRICT COURT ERRED IN DISMISSING APPELLANTS' CIVIL ACTION AGAINST THE UNITED STATES.

Argument

As noted by the district court's Order of Dismissal, the United States Supreme Court has set forth that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts" which would allow him the requested relief. See ***Conley v. Gibson***, 355 U.S. 41, 45-46, 78 S.Ct. 98, 102 (1957). In making such a determination, the plaintiff's allegations must be accepted as true, and construed most favorably to the plaintiff. See ***Powell v. United States***, 945, F.2d 374, 375 (11th Cir. 1991). Based upon these two concepts, Appellants respectfully challenge the district court's dismissal of the case.

While the legislative history behind the creation of the 100:1 ratio is important to "flesh out" the entire story behind the problems that have resulted since the enactment, it does not represent the gist of Appellants' Complaint. The entire basis for Appellants' Complaint rests not upon what Congress has done in the past, but rather, what Congress refuses to do, given the information at its disposal. As such, the district court's narrow interpretation of the Complaint as raising the much-litigated issue of constitutionality of the creation of the 100:1 ratio, and its reliance on precedent in that regard, is not dispositive of Appellants' alleged failure to state a claim. However, as a matter of course, Appellants will begin with an argument

designed to address the precedent of this Circuit, followed by the argument referencing the government's violation of fundamental rights through its failure to act.

- Precedent

As noted by the district court's Order, this Circuit has repeatedly upheld the constitutionality of the statutory and guideline penalties for offenses involving "crack". The most recent of such decisions appears to be ***United States v. Hanna***, 153 F.3d 1286 (11th Cir. 1998). In ***Hanna***, it was said that "[i]n our previous cases, we have held that imposing longer sentences on crack cocaine offenders is rationally related to the legitimate purpose of distinguishing between distinguishable drugs." ***Hanna***, 153 F.3d at 1288 (citing ***United States v. Terry***, 60 F.3d 1541, 1544-45 (11th Cir. 1995) for the proposition that "Congress distinguished between the kinds of cocaine not to discriminate against people, but because crack cocaine is more dangerous, more highly addictive, more easily available, and less expensive than powder cocaine").

The problem with relying on such precedent is that much of it was established prior to either of the Reports from the Sentencing Commission being published.[4] As it is widely known now, neither powder cocaine nor crack cocaine are physiologically addictive, nor is there a difference in the chemical makeup of the two substances. As such, there no longer remains a legitimate purpose of distinguishing between "crack" and powder, as it has been shown that the two do not represent "distinguishable drugs".

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[4] ***Hanna*** does not even address the 1997 Report of the commission.

This new information as to "crack" leads to another problem with relying on out-dated precedent. Many Circuits, as did ***Hanna***, 153 F.3d at 1289, rely on the older cases as stating the nature of the law, and refuse to fully analyze the issue, as they must adhere to the particular Circuit's precedent. Contrary to such a position, Appellant's assert that the new information provided by the Sentencing Commission as taken "crack" cases out from under the shadow of the previous decisions, as the new data creates a separate and distinct set of circumstance for the constitutionality argument, both in the criminal sense and, as here, for purposes of civil complaints.

A person convicted of a crime is subject to the penalties authorized by statute "so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." ***Chapman v. United States***, 500 U.S. 453, 465, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). The new data from the Commission's Reports clearly represents that the distinctions used to enact the 100:1 ratio were arbitrary and capricious, .thereby distinguishing the post-Report cases from those relying on the unsupported pre-Report beliefs of Congress.

Substantive due process bars certain government actions regardless of the fairness of procedures used to implement them. See, ***Lillard v. Shelby County Board of Education***, 76 F.3d 716 (6th Cir. 1996). With that in mind, while Congress' procedures may have been proper at the time of formulating the 100:1 punishment scheme, the new information has totally rebutted the reasoning behind the enactment. The courts should not be bound by the passe reasoning of Congress, nor the case law interpreting such, when addressing the more recent challenges. Therefore, it is submitted that courts must revisit the stance on the constitutionality of the 100:1 ratio, without the constrictions

of the older precedent, in order to best serve the tenets of justice.

Given the above, Appellants assert that the precedent was not dispositive of the finding that they failed to state a claim. As such, and coupled with the argument below, it is urged that this Honorable Court reverse the district court's dismissal, and allow the case to proceed on its merits, as there does exist valid claims to be decided by a jury.

- Constitutional Claims

As mentioned above, while Congress' enactment decisions are part and parcel of the complaint that was filed, the true gist of the case goes to the failure of the United States Government to act in accordance with the empirical data which has removed any basis for the 100:1 penalty ratio.

"Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depends on the mode by which it is reached". ***Joint Anti-Fascist Refugee Committee v. McGrath***, 341 U.S. 123, 171-72, 71 S.Ct. 624, 95 L.Ed. 817 (1951). Furthermore, "mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." ***O'Connor v. Donaldson***, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975).

As already set forth above, Congress' actions in both 1986 and 1988, were based not on any empirical data, but rather on personal beliefs, formed in the midst of what can best be described as a "hysteria" over the war on drugs.

The flames of this "hysteria" were fanned by the overwhelming, and high-profile, media reports as to the drug epidemic that was said to be running rampant in the United States.

Going back to the above-cited quotes, the adverse publicity given to the drug problem, nor the inferences or beliefs that followed, cannot give rise to the reliability of decisions made in regard to "crack", as Congress did not have, or appear to even request, the pertinent information to enact such a sentencing disparity between "crack" and powder cocaine.

"The cornerstone of Due Process is the prevention of abusive governmental power." ***Weimer v. Amen***, 870 F.2d 1400 (8th Cir. 1989). At the time of enactment of 100:1 ratio, and new minimum mandatory requirements for "crack", the racial disparity in the sentencing structure existed, whether intentional or not. The very moment Congress received the 1995 report, rebutting the reasoning for the 100:1 ratio and confirming the racial disparity issue, Congress was fully aware of the problems. Yet, instead of working to fix the problem, Congress simply ignored it, opting instead to fall back on the "public intolerance or animosity" which was used originally. Such a choice on the part of Congress, alone, transitioned any neutral motivations into intentional discrimination. However, as additional evidence of Congress' willfulness in perpetuating this fraud on the courts and citizens of the United States, Congress abused its power to manipulate the system by ordering yet a second report, then ignored that 1997 Report as well. Congress' continued failure to change what they know to be the truth establishes a willful disregard for the administration of justice on a even-handed basis, and shows that Congress has embraced and approved racially

disparate punishment, thereby violating Appellant's civil rights, as well as all of those similarly situated.

Original knowledge and/or intent is no longer the issue. It is the continued willfulness of Congress to ignore truth and to perpetrate a discriminatory result by failing to correct a statute which has no rational basis for existence. This is the very purpose for which our Constitution and Bill of Rights were designed, to wit: to protect the citizens from those who would make laws that had such unbalanced results and clearly lack proportionality.

The facts are clear. Cocaine powder and cocaine base are chemically the same drug, and because they are the same, Congress has inappropriately continued a practice of punishing those involved in "crack" and powder cocaine offenses differently, absent any legitimate purpose or rationale. As such, Appellants have fully set forth a claim against the United States which would afford them relief. There are also clear questions for a jury to decide, to wit: as the 100:1 penalty provisions for "crack" is irrational, disproportionate, whether such a provision, as applied, violates the substantive due process and/or equal protection rights, as well as constituting cruel and unusual punishment upon those against whom the sentencing provisions are applied.

Therefore, as the new information from the Sentencing Commission has served to negate the force of any precedent on the particular issues presented in the Complaint, the district court erred in finding that Appellants had failed to state a claim and, thereby erred in dismissing the action.

CONCLUSION

WHEREFORE, Appellants assert that there existed insufficient basis for the district court to dismiss the Civil Action. As such, Appellants respectfully request that this Honorable Court vacate said dismissal, and remand the case to the district court so as to allow a jury to decide the genuine issues of material fact that the pleadings, and the arguments above, have set forth.

/s/	/s/
Marcia G. Shein	Richard D. Biggs
Attorney for Appellants	Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have this date mailed two copies of the foregoing **BRIEF OF APPELLANT** to the Assistant U.S. Attorney, **LORI M. BERANEK**, 75 Spring street, S.W., 1800 United States Courthouse, Atlanta, Georgia, 30355, by depositing said copies in the United States Postal Service with adequate postage affixed thereon to ensure their delivery.

This 6th day of December, 1999.

Respectfully submitted,

/s/

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/s/
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRODERICK GRAVES, STEVEN JONES,
GREGORY SMITH, Individually
and as class representatives,
Plaintiffs,

vs. CIVIL ACTION FILE
NO. 1:99-cv-213-JTC

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This action having come before the court, Honorable Jack T. Camp, United States District Judge, for consideration of defendant's motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is **dismissed**.

Dated at Atlanta, Georgia, this 29th day of September, 1999.

LUTHER D. THOMAS
CLERK OF COURT

By: /s/ Karen Thornton
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
September 29, 1999
Luther D. Thomas
Clerk of Court
By: /s/ Karen Thornton
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRODERICK, GRAVES, STEVEN JONES, GREGORY SMITH, Individually and as class representatives,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta
September 27 1999

LUTHER D. THOMAS, Clerk
By:/s/_____
Deputy Clerk

CIVIL ACTION
NO. 1:99-cv-213-JTC

ORDER

This case is before the Court on Defendant's Motion to Dismiss [#3-1].

I. Background

On January 26, 1999, Plaintiffs filed the present action against Defendant. Plaintiffs are African-American males serving life sentences in connection with convictions for conspiracy and possession with intent to distribute cocaine base.

Plaintiffs contend that the difference between sentencing provisions in the Sentencing Guidelines for cocaine base or "crack" offenses as opposed to "powder cocaine" offenses violates their rights under the Fifth, Sixth, and Eighth Amendments to the United States

Sixth, and Eighth Amendments to the United States Constitution. Plaintiffs contend that the statutory 100:1 quantity ratio of powder cocaine to crack cocaine is arbitrary and unsupported by scientific evidence. Plaintiffs maintain that this 100:1 ratio creates a disparity in the severity of sentences imposed for crack cocaine and powder cocaine offenses. Plaintiffs argue that the 100:1 ratio causes crack offenders to receive more severe sentences. Plaintiffs further claim that this disparity disproportionately impacts African-Americans. Plaintiffs assert that this disproportionate impact on African-Americans violates their constitutional rights.

Plaintiffs ask the court to certify the present action as a class action pursuant to Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure; to issue a preliminary and a permanent injunction preventing the imposition of criminal sentences under 21 U.S.C. §841; and to enter a declaratory judgment declaring unconstitutional all statutes and laws of the United States, including the Federal Sentencing Guidelines, involving disparate sentences between offenses involving cocaine base ("crack") and powder cocaine.

II. Discussion

A. Legal Standard for Motion to Dismiss

The purpose of a Rule 12(b)(6) motion is to determine whether the plaintiff's complaint adequately states a claim for relief. A motion to dismiss concerns only the complaint's legal sufficiency and is not a procedure for resolving factual questions or for addressing the merits of the case. See 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §1356 (2d ed. 1990). Consequently, the Court's inquiry is limited to the contents

of the complaint. GSW, Inc. v. Long County, 999 F.2d 1508, 1510 (11th Cir. 1993).

A motion to dismiss under Rule 12(b)(6) is viewed with disfavor and is rarely granted. Wright & Miller, §357 at 321. The Supreme Court has determined that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts" which would entitle plaintiff to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957). In considering a motion to dismiss, the complaint's allegations must be accepted as true and construed in the light most favorable to the plaintiff. See Powell v. United States, 945 F.2d 374, 375 (11th Cir. 1991).

B. Constitutionality of the 100:1 Ratio

In cases challenging the crack cocaine sentencing guideline, the Eleventh Circuit has repeatedly upheld the constitutionality of the statutory and guideline penalties for crack cocaine offenses. See, e.g. United States v. Butler, 102 F.3d 1191, 1194 (11th Cir. 1997) (rejecting argument that no rational basis exists for drawing a distinction between crack cocaine and powder cocaine; upholding against an Equal Protection challenge), cert. denied, __ U.S. __, 117 S.Ct. 1712 (1997); United States v. Terry, 60 F.3d 1541, 1544 (11th Cir. 1995) (same); United States v. Solomon, 848 F.2d 156, 157 (11th Cir. 1988) (rejecting claim that crack cocaine penalties are cruel and unusual in violation of the Eighth Amendment). Even after considering the Sentencing Commission's recommendation to Congress that the Guidelines be revised with respect to crack cocaine offenses, the Eleventh Circuit adhered to precedent and rejected constitutional challenges to the guideline for crack offenses. United States v. Hanna, 153 F.3d 1286, 1288 (11th Cir. 1998) (per curiam) ("Therefore, we need not give the Commission's

weight, and, instead, must adhere to this Circuit's precedent.") (Citation omitted).

Given the clear precedent in the Eleventh Circuit on the constitutionality of the sentencing guideline for crack offenses, the Court finds that Plaintiff's Complaint does not state a claim upon which relief can be granted.[1]

III. Conclusion

For the reasons set forth above, Defendant's Motion to Dismiss [#3-1] is GRANTED. Plaintiff's Complaint [#1-1] is DISMISSED with prejudice. The Clerk is DIRECTED to enter judgment accordingly.

SO ORDERED, this 27 day of SEPTEMBER, 1999.

/s/ Jack Camp
JACK T. CAMP
UNITED STATES DISTRICT JUDGE

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[1] Because the Court grants Defendant's Rule 12(b)(6) motion, the Court does not address the issue of class certification.